IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 61436-3-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
NADDER BARON HAGHIGHI,	)	Unpublished Opinion
	)	
Appellant.	)	FILED: August 17, 2009
	)	

Lau, J.—Posing as a wealthy international entrepreneur, Nadder Baron Haghighi wrote a series of bad checks. The jury convicted him of one count of first degree theft and seven counts of unlawful issuance of checks. He appealed, contending (1) the State provided inadequate notice of its intent to seek an exceptional sentence, (2) the trial court violated his right not to be tried while incompetent by failing to observe adequate constitutional procedures, (3) his attorney's failure to assert diminished capacity deprived him of a fair trial, (4) the trial court erroneously admitted the bank records, and (5) his convictions on two counts of unlawful issuance of checks violate double jeopardy therefore resentencing is necessary. Because e-mail notice to his attorney satisfies the statutory requirements, the risk of erroneous deprivation of Haghighi's right to a fair trial is minimal, his attorney's representation constitutes

legitimate trial strategy, the trial court properly applied the inevitable discovery rule in admitting bank records and tenable grounds support the decision to forego an evidentiary hearing, we affirm the convictions. But because two convictions, counts 4 and 5 for unlawful issuance of checks, cannot stand when based on the same facts, we remand to vacate one count.

FACTS

In October 2005, Haghighi opened two accounts with Allstate Bank. Allstate is based in Illinois and provides banking services only via the Internet. Haghighi provided a $150,000 check to fund the accounts. The same day, the bank ordered new checks for him. But Allstate soon learned there were insufficient funds to cover the check Haghighi used to fund the accounts. On October 11, 2005, it sent Haghighi a letter informing him of the problem.

Haghighi subsequently wrote numerous checks drawn on his Allstate accounts. On November 15, 2005, he gave Alexandr Kravchenko and his wife Galina Kravchenko each checks for $3,150.26. The Kravchenkos believed they were employees of Haghighi's business. When the checks bounced, Haghighi told the Kravchenkos that he had millions of dollars in foreign currency, but it took extra time to convert the funds to United States dollars.

On November 23, 2005, Kurt Riber met with Haghighi to sell him some business clothes. Haghighi told Riber he was the chief executive officer (CEO) of New Millennium Enterprises, an import and export business that had 27,000 employees and did millions of dollars in business. He gave Riber a check for $40,244 to cover half the

price of his order. After the check bounced, Haghighi said he was having banking troubles but that he would clear it up and send a new check right away. Riber never received payment.

On December 5, 2005, Haghighi gave Michael Dziak, president of a video and film production company, a check for $1,400 to produce a commercial for Haghighi's New Millennium Enterprises business. The check bounced for insufficient funds. Haghighi also gave Dziak another bad check for $2,500 on the same day. He convinced Dziak to deposit the check and give him $2,500 in cash.

On December 16, 2005, Haghighi opened an account at Venture Bank. He presented a check for $8,600 to Marie Erskine, a bank employee. Haghighi persuaded Erskine to give him $4,000 in cash. The check was drawn on one of the Allstate accounts and was returned without payment.

On December 30, 2005, Haghighi gave Philip Baskaron a check for $1,000 in exchange for $500 cash and to set up a prepaid business account at Baskaron's convenience store. The check bounced. Then on January 3, 2006, Haghighi wrote a $50,000 check to Baskaron personally in connection with a real estate investment. That check also bounced.

The State charged Haghighi with seven counts of unlawful issuance of checks or drafts and one count of first degree theft. Haghighi's first attorney requested a bail reduction, but the court denied his motion. At the hearing, attended by Haghighi, the deputy prosecuting attorney informed the court that the State would be seeking an exceptional sentence based on Haghighi's history of passing bad checks. Haghighi's

attorney also requested the court to order a competency evaluation based on his belief that Haghighi appeared delusional. According to the attorney, Haghighi truly believed he was the CEO of a major international corporation with thousands of employees even though this was not true. The court ordered a competency evaluation at Western State Hospital.

Dr. Robert Howenstine evaluated Haghighi and diagnosed him with a personality disorder. But he also concluded that Haghighi was competent to stand trial. A defense expert independently evaluated Haghighi and agreed he was competent. At a hearing and after reviewing Dr. Howenstine's report and hearing from counsel, the court determined that Haghighi was competent to stand trial. It then entered uncontested findings of fact and conclusions of law to support its decision.

Shortly after this, Joseph Chalverus replaced Haghighi's first attorney. Tensions soon developed between Chalverus and Haghighi. On May 24, 2007, Haghighi wrote a letter to the court stating, "Today, I in effect fired Mr. Joseph Chalverus from my case." Nevertheless, Chalverus continued to represent Haghighi until July 23, when Charles Hamilton III replaced him as defense counsel. Several weeks earlier, on June 28, the deputy prosecuting attorney sent an e-mail to Chalverus stating, "[W]e intend to seek an exceptional sentence based on RCW 9.94A.535(2)(c)—defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." The following day, Chalverus responded to the e-mail, requesting a specific plea offer. The prosecutor reiterated that she intended to seek an exceptional sentence. After Hamilton substituted for Chalverus later that

month, trial was set for October 23.

Before trial Hamilton moved to suppress Allstate's bank records concerning Haghighi. A superior court judge had previously approved a search warrant for the records on February 27, 2006. By that point, several people had identified Haghighi by photo montage and provided copies of fraudulent checks to the police. The search warrant affidavit identified account and check numbers involved. Allstate provided the records after Kent Police Detective Robert Kaufmann faxed the search warrant to Allstate's Illinois office. While conceding there was probable cause to support the search warrant, Hamilton argued that the "extraterritorial search and seizure lacked constitutional authority" and that "its fruits must be excluded." The trial court concluded no constitutional violation occurred, but the warrant was not legally enforceable in Illinois because the State did not follow proper procedures to enforce the warrant there. Nevertheless, the court declined to suppress the bank records, finding "abundant evidence" that they would inevitably have been discovered despite the State's failure to follow proper procedures. Hamilton objected and requested an evidentiary hearing on the inevitable discovery issue, but the court declined.

At the omnibus hearing, Hamilton noted a diminished capacity defense in the pretrial omnibus order. But he later chose not to pursue this defense at trial and presented no expert testimony regarding Haghighi's mental health. His closing argument instead focused on weaknesses in the State's evidence and suggestions that Haghighi was a victim of identity theft who did not intend to defraud anyone.

The unlawful check issuance "to convict" jury instructions for counts 4 and 5

contained identical wording and pertained to the same victim and the same date. During deliberations, the jury asked the court to clarify whether the two counts referred to two separate checks. The court responded, "Please refer to your instructions." The jury convicted Haghighi on all counts.

Before sentencing, Hamilton obtained a psychological evaluation of Haghighi with Dr. Brett Trowbridge. Dr. Trowbridge concluded that "Mr. Haghighi suffers from a delusional disorder with grandiosity" and that he "genuinely believes that at any moment his funds from his overseas accounts will be freed up and he will be able to cover all of the checks he has written."

At the sentencing hearing on March 7, 2008, the State sought an exceptional sentence. Hamilton argued that the State did not give proper notice of its intent to seek an exceptional sentence because the June 28, 2007 e-mail it sent Chalverus on the subject was too informal. But at no point did Hamilton claim surprise by the State's sentencing request or that he failed to receive actual notice of the State's intent prior to trial. The court rejected his notice argument and imposed 96 months exceptional sentence for the theft count.

The court found that Haghighi's offender score was 21 based on 7 "other current offenses" and 14 prior felony convictions for similar crimes, 3 of which occurred in California. Hamilton objected to the offender score based on the court's inclusion of the three California convictions. In response, the trial court concluded, "[E]ven if the court found that those out of state—the California convictions didn't count, the court

would still impose an exceptional sentence." Report of Proceedings (Mar. 7. 2009) at 25–26.

The court imposed 60 months on each of the remaining counts, to be served concurrently. Haghighi appeals.

ANALYSIS

Notice

First, Haghighi contends that the State's notice of intent to seek an exceptional sentence was inadequate. On June 28, 2007, the deputy prosecuting attorney sent an e-mail to Chalverus stating, "[W]e intend to seek an exceptional sentence based on RCW 9.94A.535(2)(c)—defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." Haghighi contends that this e-mail did not satisfy RCW 9.94A.537(1)'s notice requirement. Statutory interpretation is a question of law, reviewed de novo. Calhoun v. State, 146 Wn. App. 877, 885, 193 P.3d 188 (2008).

RCW 9.94A.537(1) provides,

> At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

This statute permits an exceptional sentence only when the State has given pretrial

notice that it intends to seek a sentence above the standard range. State v. Womac, 160 Wn.2d 643, 663, 160 P.3d 40 (2007). But the statute does not specify any particular form or manner in which the State must give notice. State v. Bobenhouse, 143 Wn. App. 315, 331, 177 P.3d 209, review granted, 164 Wn.2d 1021 (2008).

Haghighi argues that e-mail notice is too informal to comply with this statute. He contends its requirement that the State "give" notice is equivalent to requiring that it "serve" notice in accordance with Civil Rule 5. But he cites no case and we know of none that stands for this proposition. In Bobenhouse, the prosecutor wrote a letter to the defense attorney informing him that the State would seek an exceptional sentence and the statutory basis for the sentence. The defense attorney acknowledged receiving the letter. The court emphasized, "[N]o particular form of notice is specified by the statute" and concluded, without reference to CR 5, that the letter was sufficient to satisfy RCW 9.94A.537(1)'s notice requirement. Bobenhouse, 143 Wn. App. at 331.

Here, the prosecutor sent an e-mail to Haghighi's attorney informing him that the State would seek an exceptional sentence and the statutory basis for the sentence. Chalverus acknowledged receiving the e-mail by responding to it the next day. We conclude that this e-mail exchange was sufficient to satisfy RCW 9.94A.537(1)'s requirement that the State give Haghighi notice. Haghighi objects that e-mail accounts can become "clogged" and computer filters can inadvertently block e-mails without the recipient noticing. But he does not suggest that any of these problems occurred in his case or that Chalverus did not receive the e-mail. Indeed, the record demonstrates that Chalverus received actual notice of the State's intent to seek an exceptional sentence.

Haghighi also contends the notice was inadequate because his relationship with Chalverus had broken down, as evidenced by his May 24, 2007 letter claiming to have fired Chalverus. But a court-appointed attorney may not withdraw without an order of the court, and Chalverus continued to represent Haghighi until Hamilton was approved as his attorney two months later. CR 71(b). And there is nothing in the record suggesting that Hamilton was unaware of the State's intent prior to trial. Moreover, Haghighi was present at a bail reduction hearing several months prior to trial during which the deputy prosecuting attorney informed the court that the State intended to seek an exceptional sentence. Under these circumstances, we hold that the State satisfied RCW 9.94A.537(1)'s notice requirement.

Competency

Next, Haghighi argues that the failure to observe constitutionally adequate procedures deprived him of a fair trial. The Constitution guarantees criminal defendants the right to a fair trial, and the conviction of defendant who is legally incompetent violates this right. Pate v. Robinson, 383 U.S. 375, 378, 386 S. Ct. 836, 15 L. Ed. 2d 815 (1966). Due process requires that State procedures be adequate to protect a defendant from this result. Id. We review constitutional issues de novo. Rhoades v. Dep't of Labor & Indus., 143 Wn. App. 832, 843, 181 P.3d 843 (2008).

Under RCW 10.77.060(1), the court must appoint experts to examine and report on the defendant's mental condition if "there is reason to doubt" the defendant's competency. RCW 10.77.060(1). In Haghighi's case, the court made this threshold determination, ordered Haghighi to be evaluated at Western State Hospital, and set a

date for a competency hearing. Dr. Howenstine evaluated Haghighi and produced a written report concluding that he was competent. The court reviewed the report prior to the competency hearing. At the hearing, Haghighi's counsel informed the court that a defense expert had also evaluated Haghighi and agreed with Dr. Howenstine's conclusion. The court determined that Haghighi was competent and entered findings of fact and conclusions of law to support its decision. Haghighi contends that due process required the court to conduct a more thorough evidentiary hearing to test the experts' conclusions and the failure to do so rendered the competency hearing constitutionally defective. We disagree.

Due process is a flexible concept that requires only "'such procedural protections as the particular situation demands.'" Mathews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (quoting Morrissey v. Brewer, 408 U.S.471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)). In general, courts look to three factors to determine what process is due—the private interest to be protected, the risk of erroneous deprivation of that interest, and the government's interest in maintaining the procedures. Mathews, 424 U.S. at 335.

Here, the requirements of due process were satisfied. While Haghighi's right not to be tried while incompetent is of fundamental importance, the risk of erroneous deprivation of that right was minimal. Haghighi was evaluated by both Dr. Howenstine of Western State Hospital and his own expert. Dr. Howenstine's report included a detailed clinical history, a summary of his interviews with Haghighi and Haghighi's mother, a description of possible psychological diagnoses, and an explanation of his

reasons for concluding Haghighi was competent. The court reviewed Dr. Howenstine's report and Haghighi's attorney informed the court that Haghighi's own expert agreed he was competent to stand trial.[1] This satisfied Haghighi's attorney that he was competent, an important consideration in a trial court's determination of competency. State v. Israel, 19 Wn. App. 773, 779, 577 P.2d 631 (1978). And no other experts had examined Haghighi or come to a different conclusion regarding his competency. Haghighi does not explain what a more extensive hearing would have accomplished under these circumstances.

Moreover, the record indicates the same judge had multiple opportunities to observe Haghighi in court previously. Neither of Haghighi's subsequent attorneys raised concerns about his competency, and the record does not show that issues regarding his competency arose during the trial. Balanced against the State's interest in trying Haghighi, due process did not require the court to conduct a more extensive hearing under these facts.

Ineffective Assistance of Counsel

Haghighi next contends that his attorney deprived him of adequate representation because Hamilton did not advance a diminished capacity defense at trial. "A diminished capacity defense requires evidence of a mental condition, which prevents the defendant from forming the requisite intent necessary to commit the crime charged." State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). A defendant must produce expert testimony on the issue. State v. Eakins, 127 Wn.2d 490, 502, 902 P.2d

[1] Defense counsel also represented to the court that a written report of the expert's findings was unnecessary.

1236 (1995). To convict a defendant of unlawful issuance of a check, the State must prove the defendant "wrote the check with intent to defraud, knowing he had insufficient funds in his account." State v. Ben-Neth, 34 Wn. App. 600, 606, 663 P.2d 156 (1983). To convict a defendant of first degree theft, the State must prove the defendant intended to deprive a person of property worth more than $1,500. State v. Walker, 75 Wn. App. 101, 879 P.2d 957 (1994).

Haghighi points to Dr. Trowbridge's report to argue that his attorney was ineffective. In the report, Dr. Trowbridge opined that Haghighi was delusional and that he "genuinely believes that at any moment his funds from his overseas accounts will be freed up and he will be able to cover all of the checks he has written." Haghighi claims that his attorney should have obtained this opinion from Dr. Trowbridge before trial and used it to argue that the intent element was not satisfied because he genuinely believed that he would be able to repay everyone after obtaining funds from overseas.

To demonstrate ineffective assistance of counsel, Haghighi must satisfy both prongs of a two-prong test. State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). First, he must establish that his counsel's representation was deficient. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To show deficient performance, he has the "heavy burden of showing that his attorneys 'made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment . . .'" State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). His attorney's conduct must have fallen below an objective

standard of reasonableness given all the facts and circumstances. State v. Meckelson, 133 Wn. App. 431, 436, 135 P.3d 991 (2006). Deficient performance is not shown by matters that go to trial strategy or tactics. Hendrickson, 129 Wn.2d at 77–78. Second, Haghighi must show that his attorney's deficient performance resulted in prejudice such that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78. There is a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335.

Haghighi fails to demonstrate that his attorney's performance was deficient or prejudicial. He relies on Dr. Trowbridge's opinion that he was deluded into believing that he would be able to pay people back after receiving funds from overseas accounts. But this opinion is not inconsistent with the intent element of his crimes. At most, it shows that Haghighi intended to repay his victims at some future point, after first writing checks on his Allstate accounts when he knew there were insufficient funds to cover them. There is no evidence in Dr. Trowbridge's report or elsewhere in the record that Haghighi had a delusion that his Allstate accounts contained sufficient funds to cover the checks he was writing, so the strength of a diminished capacity defense is doubtful. Based on the pretrial omnibus order, it appears that Hamilton initially considered a diminished capacity defense, but ultimately chose to pursue a different strategy. This strategy included critiques of the State's witnesses and suggesting that Haghighi could have been the victim of identity theft. Haghighi fails to establish that this was an illegitimate trial strategy. Moreover, even if Hamilton had obtained Dr. Trowbridge's

report prior to trial and made the argument Haghighi now urges, there is not a reasonable probability the result would have been different. Because Haghighi cannot demonstrate deficient performance or prejudice, his ineffectiveness claim fails.

Suppression of Bank Records

Haghighi also contends that the State did not prove that it would have inevitably discovered his Allstate Bank records and that the trial court erred by not conducting an evidentiary hearing. The trial court's conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Its denial of a request for an evidentiary hearing is reviewed for abuse of discretion. State v. McLaughlin, 74 Wn.2d 301, 303, 444 P.2d 699 (1968).

Relying on the inevitable discovery rule, the trial court denied Haghighi's motion to suppress the bank records. Under this rule, evidence that would normally be suppressed is admissible "if the State can prove by a preponderance of the evidence that the police did not act unreasonably or in an attempt to accelerate discovery, and the evidence would have been inevitably discovered under proper and predictable investigatory procedures." State v. Avila-Avina, 99 Wn. App. 9, 17, 991 P.2d 720 (2000). The State has the burden of proving that the doctrine applies and cannot rely on speculation as to whether or how the evidence would have been discovered. State v. Richman, 85 Wn. App. 568, 577, 933 P.2d 1088 (1997).

Here, the court found that Detective Kaufmann did not act unreasonably or attempt to accelerate discovery and that proper and predictable investigatory procedures would inevitably have led to the bank records. Haghighi argues this is

nothing more than speculation. But as the trial court found,

> [A]t the time the warrant was sought, the investigation by Detective Kaufmann was mature: the defendant's identity was not at issue in any way; police had in their possession documentation that would inevitably lead to the bank records, including copies of the bounced checks with the bank and bank account numbers at issue listed; and there was substantial evidence that this was an ongoing scheme or plan to defraud.

And there was no dispute that the warrant was valid and supported by probable cause. Under these circumstances, the trial court properly concluded the State would have discovered Haghighi's bank records.

Haghighi also assigns error to the trial court's failure to conduct an evidentiary hearing on the inevitable discovery issue. CrR 3.6(a) requires the moving party to support a motion to suppress with an affidavit or document "setting forth the facts the moving party anticipates will be elicited at a hearing." The trial court decides whether a hearing is required based on those materials, together with any response. CrR 3.6(a). If the court determines that no evidentiary hearing is required, it must enter a written order setting forth its reasons. Here, the court did not specifically explain its rationale for denying an evidentiary hearing. But our review of the record demonstrates the trial court heard extensive argument and considered comprehensive briefing on Haghighi's suppression motion. In addition, in its written findings and conclusions, the court stated that none of the relevant facts was disputed. Because these are tenable grounds for not conducting an evidentiary hearing, the trial court did not abuse its discretion.

Resentencing

Finally, Haghighi claims that his convictions for counts 4 and 5—unlawful

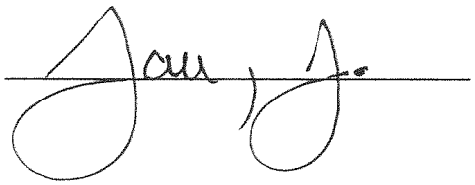
issuance of checks—violate double jeopardy and resentencing is the proper remedy. The constitutional protection against double jeopardy prevents a defendant from multiple punishments for the same offense. Womac, 160 Wn.2d at 650. Here, the "to convict" jury instructions for unlawful issuance of checks counts 4 and 5 contained identical wording and pertained to the same victim and the same date. During deliberations, the jury requested clarification from the court regarding the difference between counts 4 and 5. Rather than clarifying that each count referred to separate and distinct acts, the court responded, "Please refer to your instructions." The State properly concedes this allowed the jury to convict Haghighi on both counts based on a single act and the proper remedy is to vacate one of the counts.

But remand for resentencing is not required if this court is confident that the trial court would impose the same sentence. See State v. Post, 118 Wn.2d 596, 616, 826 P.2d 172, 837 P.2d 599 (1992). Here, the trial court imposed the exceptional sentence because Haghighi's high offender score would otherwise result in some of his current offenses going unpunished.[2] RCW 9.94A.535(2)(c). The court specifically stated that even if Haghighi's California convictions, which added three points to his offender score, were not included, the court would impose the same sentence. Therefore, we conclude the trial court would impose the same sentence despite a one point reduction in Haghighi's offender score. Haghighi argues resentencing is necessary because "the court nowhere stated it would impose the exceptional sentence if it did not include

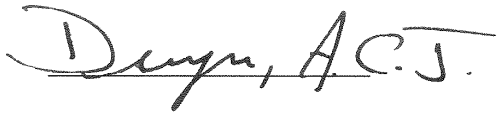
[2] The maximum offender score in the Sentencing Reform Act's grid is 9. RCW 9.94A.510.

those California convictions in addition to the conviction for a current offense that now needs to be vacated." Appellant's Reply Br. at 14. But Haghighi did not challenge the inclusion of the California convictions in his appeal, so the reduction in his offender score is one, not four. Resentencing is unnecessary here, but one count must be vacated.

We affirm the convictions but remand to vacate one unlawful check issuance count consistent with this opinion.[3]



WE CONCUR:



[3] Haghighi makes several additional arguments in a pro se statement of additional grounds. He argues that he received ineffective assistance because his attorneys failed "to submit important documentation." It is not entirely clear what documents he contends should have been submitted, but some allegedly show that his great uncle "embezzled" funds from him. But assuming such documents exist, Haghighi does not explain how they are relevant to the current prosecution, so he fails to demonstrate that that his counsel's performance was deficient. Haghighi also objects to the trial court's failure to sentence him under the drug offender sentencing alternative (DOSA). But the trial judge's decision on whether to grant a DOSA is generally not reviewable. RCW 9.94A.585(1); State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). Haghighi also objects to "proof of all documents to court," and about a "copy of sentencing in Snohomish County," but it is not clear what error he is alleging, so review is not possible. RAP 10.10(c). Haghighi also asserts generally that the process "clearly violated all my civil, constitutional rights," and that the prosecutor "became overzealous" and "clearly was not even interested in the administrating justice." But there is nothing in the record to indicate prosecutorial misconduct or that Haghighi received anything but a fair trial. Haghighi's pro se arguments are without merit.